Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

A. UBERTI & C.
Petitioner,

v.

SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA;
HON. JOHN M. LEONARDO, JUDGE
(THOMAS AND DELIA CORDOVA,
REAL PARTIES IN INTEREST)
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Where an Italian manufacturer produced goods to the specifications of a Massachusetts corporation, making delivery F.O.B. Milan, the Massachusetts corporation packaged and sold the goods as its own, and one of these goods caused harm in Arizona seventeen years later, does the Due Process Clause permit Arizona to assert personal jurisdiction over the Italian manufacturer:

   a. based on the conclusion that the good's nature--a replica of a firearm associated with western U.S. history--sufficiently establishes its maker's "purposeful availment" of the protections of Arizona law;

   b. based upon the conclusion that, while the manufacturer had no knowledge that the Massachusetts corporation might resell to Arizona residents, it could have determined such by inquiry;

   c. in the absence of proof that the good in question entered the State through normal commercial channels, or that the Massachusetts corporation did in fact sell this or any goods to Arizona residents.

2. Whether, consistent with fundamental fairness, a non-American manufacturer may be subjected to personal jurisdiction on the bases that:

   a. a State's interest in providing remedies for its residents outweighs all but the most significant

burdens on foreign defendants, and

b. the ability to communicate by telephone and facsimile renders managable the burdens of international defense.

Subsidiary included questions are noted in the margin.[1]

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[1] Subsidiary and more particular questions raised by the decision below are:

(a) Is the proper test for personal jurisdiction that stated by the plurality, or that stated by the Brennan concurrence, in *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986)?

(b) If the proper test is that stated by the plurality, can "purposeful availment" by design for the forum State's markets be shown by a design which:

(i) bears a relationship to the entirety of the United States or to a region thereof, rather than to the forum State in particular and

(ii) is not mandated by any legal or administrative requirements of the forum.

(c) If the proper test is that stated in the Brennan concurrence, can "stream of commerce" jurisdiction be premised upon sale of 22,000 items to a Massachusetts corporation over an eight year period, where only one of those items--the one at issue--was shown to have reached the specific forum State two thousand miles away?

(d) Is the *World-Wide Volkswagen* requirement that the good at issue be shown to have entered the forum through the normal distribution chain applicable only where the defendant is shown to have taken measures to restrict distribution to residents of the forum?

BEST AVAILA

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Supreme Court of Arizona are named in the caption. Petitioner A. Uberti & C. has no parent corporation and no subsidiaries or affiliates. Uberti USA, mentioned in the record below, is an American corporation with which Petitioner shares no ownership, directorate, or control.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner A. Uberti & C., a corporation organized under the laws of the Republic of Italy, requests that a writ of certiorari issue to review the final order of the Arizona Supreme Court entered in this case on April 11, 1995.

OPINIONS BELOW

The decision of the Superior Court, Pima County, Arizona, is reproduced in Appendix A, *infra*. The decision of the Arizona Court of Appeals, Division Two, is reported at 177 Ariz. 451, 868 P.2d 1034, and is reproduced in Appendix B, *infra*. The opinion of the Arizona Supreme Court is reported at 892 P.2d 1354 and reproduced in Appendix C, *infra*.

JURISDICTION

By a final order of April 11, 1995, the Supreme Court of the State of Arizona held that the courts of that State had personal jurisdiction of the Petitioner consistent with the due process clause of the Fourteenth Amendment, and reversed the order of the Arizona Court of Appeals requiring dismissal of the action. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 4.2(a), Arizona Rules of Civil Procedure, provides in relevant part:

> A court of this state may exercise personal jurisdiction over parties, whether found within

or outside the state, to the maximum extent permitted by the Constitution of this state and the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law;....

STATEMENT OF THE CASE

I. Proceedings Below.

Petitioner A. Uberti & C. was named as Defendant in a wrongful death and product liability action brought in the Superior Court of the State of Arizona. Plaintiffs, representatives of decedent Corrina Cordova, alleged that her death was caused by a firearm manufactured by Uberti which fired after falling from a vehicle. Uberti is incorporated under the laws of the Republic of Italy. It does not have and has never had offices, employees, or property in Arizona.

Plaintiffs undertook to serve Uberti through the provisions of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 10071, by transmitting copies of the summons and complaint to an entity designated to serve process in Italy. Pursuant to the terms of the Convention, they took default judgment after the lapse of six months from the transmission. Petitioner Uberti learned of the action when it

received a copy of the judgment. It successfully moved to set aside the default and then to dismiss or in the alternative for summary judgment.

By its motion, Uberti challenged the jurisdiction of the Superior Court of the State of Arizona, contending that any assertion of personal jurisdiction contravened the Fourteenth Amendment. The Superior Court treated the action as one for summary judgment and denied the motion, asserting the existence of minimal contacts sufficient under the Due Process Clause. Appendix A at 1-2.

Uberti then challenged the Superior Court's ruling by filing a Petition for Special Action[2] in the Arizona Court of Appeals. The Court of Appeals, relying upon *Asahi Metal Industries v. Superior Court*, 480 U.S. 102 (1986) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), ruled that the assertion of jurisdiction was barred by the Due Process Clause. It found that all but one of the contacts relied upon by the trial court long postdated the Uberti/Iver Johnson arrangement. The one remaining allegation--that the firearm was a replica of an 1873 revolver popularly associated with the history of the western United States--could not demonstrate purposeful direction of sales toward Arizona in particular. Appendix B at 5. It further noted that Plaintiffs were unable to show

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2 Under Arizona procedure, the special action combines remedies formerly sought under writs of mandamus, prohibition, and certiorari. Ariz. R. Pro. Special Actions 1.

how the firearm came to be in Arizona nearly twenty years after manufacture. *Id.*

Defendants sought review by the Supreme Court of Arizona. The Supreme Court of Arizona reversed, ruling that the assertion of specific jurisdiction was consistent with due process as delineated by the *Asahi* plurality. It based the reversal upon the conclusion that, since Uberti had at the request of an American company produced a replica of an item associated with the history of the western United States, it had directed its business toward the United States as a whole. Appendix C at 17-18. This, the court held, was sufficient "purposeful availment" to support personal jurisdiction in Arizona. *Id.* at 19-20. *World-Wide Volkswagen*'s bar on jurisdiction based on fortuitious product movement was held inapplicable, since Uberti had not restricted sale of the product in the forum. *Id.* at 14.

II. Facts Established

The following facts are those relied on or acknowledged by the Court of Appeals and the Supreme Court of Arizona in reaching their decisions.

A. Uberti & C. is an Italian corporation. It has no agents, offices, physical presence, or property in Arizona or indeed anywhere in the United States. Appendix B at 2; Appendix C at 9.

In the 1970's, Iver Johnson, an established Massachusetts firearms manufacturer, desired to market a replica of the 1873 Colt single-action

revolver. It made an agreement with Uberti whereby Uberti would manufacture the revolver to Iver Johnson specifications and mark it with Iver Johnson's name as importer. Appendix C at 15-16; Appendix B at 2. Pursuant to Federal requirements, the firearm also bore Uberti's name as original manufacturer. Appendix B at 2.

Uberti delivered the revolvers to Iver Johnson F.O.B. Milan, Italy. Appendix B at 2. Iver Johnson imported them, packaged them, and marketed them as the "Iver Johnson Cattleman." *Id.* Iver Johnson had no contractual arrangement with Uberti regarding its subsequent retailing or distribution activities. Appendix B at 5. Uberti did not know that Iver Johnson might sell its revolvers in Arizona; for all the record shows, Uberti never even heard of Arizona. Appendix C at 18.

The firearm in question was destined for a limited collectors' market: it had no special military, defensive or sporting applications. Appendix C at 17. In 1974, when this particular firearm was made, Uberti manufactured 2,178 revolvers for Iver Johnson. *Id.* at 16.[3] Between 1975

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[3] The record is silent as to how many of these reached the forum, or indeed *if any* any Iver Johnson Cattlemen other than the one at issue did so. Plaintiffs showed only that in 1993 some 22 Uberti firearms could be found there: it was not shown that any of these related to the 1975-78 Iver Johnson production. Appendix D. For all the record shows, the firearm at issue may be *the only* Uberti/Iver Johnson firearm in the forum--and even it was not shown to have been retailed there.

and 1978, Uberti manufactured and transferred to Iver Johnson a total of 22,000 revolvers. *Id.*.

The firearm in question here was transferred to Iver Johnson in Massachusetts in November, 1974. Appendix B at 2. Plaintiffs were unable to establish how it thereafter came to be in Arizona. *Id.* at 5. In 1991, an Arizona resident named Henry Pacho acquired the revolver. Appendix C at 2. He stored it, loaded, under the seat of his automobile. It was dropped, discharged, and killed Corrina Cordova. *Id.* at 3. Her representatives brought an action for wrongful death and product liability in the Superior Court of Pima County, Arizona. *Id.*

Upon these facts, the Arizona Supreme Court upheld specific jurisdiction over Uberti. Noting a division of authority between the "purposeful availment" standard of the *Asahi* plurality and the "stream of commerce" standard of the *Asahi* concurrence, the court stated it would apply the former test. Appendix C at 12. Noting the plurality suggestion that design for a particular State's markets could establish purposeful availment, the court argued that the design need not be specific to the forum State: Arizona courts could sustain jurisdiction whenever it could be shown that a product's design appealed to American consumers as a whole. *Id.* at 19. It further found that assertion of jurisdiction over Uberti was consistent with fundamental fairness: interests of the forum and plaintiff in redress were so substantial they could only be offset by "a very significant burden" of

defense, Appendix C at 25, and the burden here was not significant because "Telephones, facsimile machines, and photocopiers answer the logistical problems as easily for lawsuits pending in Arizona as those anywhere in a world reached by telecommunication satellites." *Id.* at 26.

III. Preservation of the Federal Questions.

As Arizona asserts jurisdiction "to the maximum extent permitted by the Constitution of this state and the Constitution of the United States," Rule 4.2(a), Arizona Rules of Civil Procedure, the requirements of the Due Process Clause of the Fourteenth Amendment formed the focus of all relevant motions and decisions below. The constitutional issue was raised and decided in Petitioner's Motion to Dismiss, Appendix A at 1-2, the Arizona Court of Appeal's reversal of the decision upon that motion, Appendix B at 4, and the Arizona Supreme Court's reversal of the appellate decision. Appendix C at 9-10. As the last notes, "Arizona will assert personal jurisdiction over a nonresident defendant to the maximum extent allowed by the federal constitution. [citations omitted] The jurisdictional issue thus hinges on federal law."*Id.*

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Supreme Court of Arizona has:

1. Decided a Federal question in a way in conflict

with decisions of this Court; and

2. Decided a Federal question in conflict with decisions of Federal courts of appeals and of the courts of last resort of other States.

I. Background of the Questions

In *International Shoe Co. v. State of Washingtton*, 326 U.S. 310, 316 (1945), this Court recognized that a State might assert personal jurisdiction over a nonresident based on minimal contacts, provided that maintenance of the action comported with traditional notions of fair play and substantial justice. The half-century since that ruling has witnessed a continual tension between the interest of each State in maximizing its residents' ability to sue nonresidents and the restrictions implicit in territorial sovereignty, federalism, and the due process clause.

To *International Shoe*'s requirements of basic fairness and minimal contacts *Hanson v. Denckla*, 357 U.S. 235 (1958), appended the caution that the contacts must at least involve acts by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State." 357 U.S. at 253. Notwithstanding this qualification, lower courts commonly treated the caution as *dictum* and applied generalized "fundamental fairness" as the sole test of personal jurisdiction.

The response was *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), in which this Court

made it clear that the *Hanson* requirement had a Fourteenth Amendment derivation independent of fundamental fairness: it was also a "consequence of territorial limitations on the power of the respective States" and thus might restrict jurisdictional claims even where the proceeding would be fair in general terms. 444 U.S. at 294. The likelihood that a manufactured good might find its way into the forum was an insufficient basis for jurisdiction; rather, it must be shown that the defendant's conduct was such that he should be on notice of his amenability to suit in the forum. 444 U.S. at 297.

World-Wide Volkswagen was reinforced by *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986). The *Asahi* defendant manufactured components incorporated into tens of thousands of tires sold annually in the forum State, and had actual knowledge of these sales. This Court unanimously held that the assertion of jurisdiction violated fundamental fairness, but divided on whether it would also violate the "purposeful availment" test. Justice O'Connor's plurality opinion held that actual, but passive, knowledge of a third party's marketing in the forum was insufficient. Additional conduct evidencing intent to serve the forum's markets was required, such as direct advertising or design of the product for market in the forum state. 480 U.S. at 112-13. Justice Brennan's concurrence argued that jurisdiction was proper where the manufacturer had actual knowledge of extensive forum sales and the product

entered by these efforts. 480 U.S. at 117-21.

The lower courts have since divided, some applying the standards of the plurality and others those of the concurrence.[4] These divisions have further fragmented as those courts applied the chosen standards to varying facts. As will be shown *infra*, some courts hold that marketing decisions of a third party cannot be imputed to a manufacturer even if he has actual knowledge of them; others

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[4] The First, Fourth, Sixth and Eleventh Circuits follow the plurality. *See Boit v. Gar-Tec*, 967 F.2d 671 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994); *Tobin v. Astra Pharmaceutical Products*, 993 F.2d 528 (6th Cir.), *cert. denied* 114 S.Ct. 304 (1993); *Madara v. Hall* , 916 F.2d 1510 (11th Cir. 1990). The Fifth and Seventh Circuits follow the concurrence. *See Irving v. Owens Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989) ("Because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on the issue, we continue to gauge Jugometal's contacts with Texas by the stream of commerce standard...."); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992) (Continuing to apply stream of commerce since *Asahi* "Court could not agree on the proper understanding of that theory.") The Eighth Circuit initially followed the plurality, *see Falkirk Mining Co. v. Japan Steel Works*, 906 F.2d 369 (8th Cir. 1990) but has also applied the concurrence. *See Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 614 (8th Cir.), *cert. denied* 115 S.Ct. 359 (1994).

State courts of last resort have found themselves utterly at sea. In *Wiles v. Morita Iron Works, Ltd.*, 125 Ill.2d 144, 530 N.E.2d 1382 (1988), the Illinois Supreme Court described *Asahi* as an "extremely balkanized opinion" from which "it is not possible to determine ... whether the broad or narrow version of the stream of commerce theory is correct." 125 Ill.2d at 156, 157-58, 530 N.E.2d at 1389-90.

hold that actual knowledge is the touchstone; still others hold reason to know suffices. The courts divide on whether asserted "purposeful availment" must relate to the forum State, may relate to its region, or may relate to the entire United States.

Uberti widens the divisions. It holds jurisdiction can be established in the absence of proof that a foreign defendant knew of the forum, let alone directed goods there, in the absence of proof that even the third party had minimal contacts with the forum, and in the absence of proof that the good at issue entered the forum through ordinary distribution chains. Under *Uberti,* the standards of the *Asahi* plurality become far broader than those of its concurrence: meeting these in turn absolves a plaintiff from *World-Wide Volkswagen's* proscription on establishing jurisdiction based on post-retail movement of the chattel. The simple facts that a foreign manufacturer made goods for an American firm which appealed to Americans is sufficient to establish jurisidiction whereever one of the goods may be found decades later. In all but the rarest of cases--where an American inexplicably buys a good *not* designed to appeal to any American--the decision indeed makes every manufacturer "appoint the chattel his agent for service of process."*World-Wide Volkswagen*, 444 U.S. at 296.

II. The Decision of the Arizona Supreme Court Is in Conflict with Decisions of This Court and Raises Significant Federal Questions Which This Court Should Determine.

A. By Basing Personal Jurisdiction in Any One State on Supposed "Purposeful Availment" of Markets of the United States as a Whole, *Uberti* Conflicts with Prior Decisions of This Court and Raises Questions Which This Court Should Address.

In *Asahi Metal Industries*, the plurality opinion noted that "purposeful availment" of a State's markets might arise from "designing the product for the market in the forum State," 480 U.S. at 112, a commonsense recognition that an automobile manufacturer who goes to the expense of complying with California emissions standards probably has his eye on the California market.

Uberti overlooks the reasoning underlying this suggestion and discards its vital qualification "in the forum State." It holds that a simple showing that the product's appearance or design is such as to appeal to purchasers is sufficient "design ... for the market," and that a design appealing to *any* American purchaser is sufficient to give jurisdiction to *any and all* American States:

> Defendant argues, however, that the record will not support the conclusion that Defendant specifically intended its guns to be marketed in Arizona. Indeed, for all this record shows, Defendant never heard of Arizona. This raises the following question: having shown the gun was knowingly designed for and exported to exploit the market of the United States or western

> United States, must Plaintiffs additionally show that Defendant had the specific intent to market the gun in Arizona, or is it enough to show that Defendant intended to market it in any state, group of states, or all states? We conclude only the latter is necessary.

Appendix C at 19. *Asahi* reserved the question of whether minimal contacts in general could ever be assessed relative to the United States as a whole. 480 U.S. at 113, n*. The plurality suggestion that purposeful availment might be based on design is, however, expressly qualified by "in the forum State." 480 U.S. at 112-13. The qualification is necessary: virtually all American, and most foreign, products could be said to have been designed in some way to "appeal" to American consumers: but should *any State* be able to claim jurisdiction over any manufacturer upon no more than a showing that, *e.g.*, the manufacturer's appliances use 110 volt rather than 230 volt current, or that its mechanism uses non-metric bolts? *Uberti*'s application of nationwide contacts to the "specific design" analysis, combined with its assumption that "specific design" can be based upon judicial notice of probable customer appeal rather than upon compliance with forum-specific regulation, yields a test under which any manufacturer of a product whose function or appearance appeals to any Americans automatically submits to personal jurisdiction in each and all of the fifty States. If such is indeed the test, then *virtually every*

manufacturer in the United States is subject to jurisdiction *in any and all States*--most American manufacturers, after all, make products designed for the "American market" and sell to American wholesalers.[5]

B. By Basing Personal Jurisdiction Upon Distribution Efforts of a Third Party, Which Efforts Were Unknown to Defendant, *Uberti* Is in Conflict with Decisions of this Court.

In *Hanson v. Denckla* this Court counseled that personal jurisdiction was established by an act "by which the defendant purposefully avails itself of the privilege of conducting activities" in the forum, 357 U.S. at 253. *World-Wide Volkswagen* explained that this restriction arises, not purely as a matter of fairness, but as a "consequence of territorial limitations on the power of the respective States" 444 U.S. at 294. Since it is the defendant, and not others, who must establish these contacts, the Court added the warning that "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 444 U.S. at 298. The rule was underscored in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985):

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[5] A refusal to apply *Uberti* to domestic manufactuers would in the alternative raise the question of whether a State can constitutionally apply one standard of due process to residents of other American States and a different standard to non-Americans.

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts, or of the 'unilateral activity of another party or third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state.

471 U.S. at 475. (Citations omitted).

In *Asahi*, the defendant did not control the distribution, but had actual knowledge of its nature. 480 U.S. at 107, 108. The plurality found this insufficient, while the concurrence emphasized the importance of the manufacturer's knowledge to its test: "As long as a participant in the process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." 480 U.S. at 117.

In *Uberti*, the Arizona Supreme Court upheld personal jurisdiction despite the complete independence of the wholesale purchaser from Uberti[6] and despite uncontested evidence that Iver Johnson never enlightened Uberti as to where and how it

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6 We use the term "wholesale purchaser" rather than "distributor." Iver Johnson did not hold itself out as distributing Uberti arms. As noted above, Uberti made firearms to Iver Johnson's specifications, it stamped them with Iver Johnson's name, and Iver Johnson sold them as its own "Iver Johnson Cattlemen."

was selling its firearms. "...[N]othing in this record indicates that Defendant knew the extent of Iver Johnson's sales efforts." Exhibit C at 20. *Uberti* thus places the Arizona Supreme Court at odds with *Hanson*, *World-Wide Volkswagen*, *Burger King*, and with the *Asahi* plurality; indeed, it stretches the last to find jurisdiction beyond the parameters of the *Asahi* concurrence.

Uberti's explanation of this Court's decisions turns their reasoning upon its head. Lack of control over distribution, even lack of knowledge of it, becomes blameworthy indifference to the interests of the forum's residents. "Nor is there any indication that Defendant attempted to make itself aware of or to restrict those efforts." Appendix C at 20.[7]

C. By Asserting Jurisdiction in Absence of Proof the Good Entered the Forum By Regular Commercial Channels, *Uberti* Conflicts with Prior Decisions of this Court.

The firearm in question was delivered in 1974 to Iver Johnson of Massachusetts; it fell and fired in Arizona in 1991. Plaintiffs were unable to document the firearm's travels over the intervening seventeen years, or to establish that it entered Arizona via a commercial distribution chain. Appendix B at 5.

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[7] Indeed, *Uberti* holds jurisdiction may be sustained where there is *no* proof the third party *did* distribute into the forum.Plaintiffs were unable to establish that Iver Johnson *did* have an Arizona-directed marketing operation, or even how this firearm came to be in the State. Appendix B at 5.

World-Wide Volkswagen establishes that personal jurisdiction cannot be based upon post-purchase movements of the consumer, however foreseeable. Such a case would not be, from the manufacturer's standpoint, one arising "out of an act done or transaction consummated in the forum State," *Hanson v. Denckla*, 357 U.S. at 251, or one preceded by "clear notice" of exposure to suit, *Burger King*, 471 U.S. at 475 n.17. The *Asahi* plurality noted that jurisdiction cannot be based even on foreseeable actions of the intermediary, 480 U.S. at 100; the Brennan concurrence stressed that the goods entered the State through distribution channels known to the defendant. 480 U.S. at 120.

By allowing a State to claim personal jurisdiction upon simple proof that a good was found there, seventeen years after its delivery to a firm on the far side of the continent, *Uberti* places Arizona in conflict with *Hanson*, *World-Wide Volkswagen*, and *Burger King*, and with the reasoning both of *Asahi*'s plurality and that of its concurrence. In a very literal sense, *Uberti* treats a meandering chattel as its maker's agent for service of process.

D. In Asserting Jurisdiction Over a Manufacturer from a Civil Law Nation, and Overstating Forum Interests Over a Good not Sold in the Forum while Minimizing the Manufacturer's Burdens of Defense, *Uberti* Conflicts with Prior Decisions of this Court.

Where minimal contacts are found, the courts of

the forum must further determine whether maintaining jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. at 316. This determination requires consideration of the interests of the plaintiff, the defendant, and the forum, as well as the national interest in efficient resolution of controversies and in applicable social policies. *Asahi Metal Industries*, 480 U.S. at 113.

The *Asahi* Court unanimously stressed the burdens imposed upon a manufacturer whose defense must transcend, not only physical distance, but barriers of language and legal system:

> The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

480 U.S. at 115. *Uberti*, in contrast, assesses the foreign defendant's burden purely as one of distance, now eliminated by telecommunications: "Telephones, facsimile machines, and photocopiers answer logistical problems as easily for lawsuits pending in Arizona as those anywhere in a world reached by telecommunications satellites." Appendix C at 26. *Uberti* thus completely sidesteps *Asahi*'s requirement to weigh "the unique burdens placed upon one who must defend himself in a foreign legal system." Rather than "significant weight," this factor is given no weight at all.

Uberti treats the forum and resident plaintiffs' interests as exceptionally weighty: Arizona's interest in providing redress and giving a "deterrent to selling unreasonably dangerous products " is so strong that "Defendant must demonstrate a very significant burden to avoid litigation here." Appendix C at 25. In fact, as discussed *supra*, there was no demonstration that the firearm had been retailed in Arizona: the State's interest in deterring sales elsewhere is nil. As in *Asahi*, whether Arizona law applies is problematic.[8] *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). By requiring a foreign defendant to prove "a very significant burden" and treating the telephone as a panacea to problems of transcontinental defense, *Uberti* conflicts with prior rulings of this Court.

III. The Decision of the Arizona Supreme Court Is in Conflict with Decisions of the Courts of Appeal and of the Highest Courts of Other States.

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[8] Arizona follows the approach of the Restatement (2d) on Conflict of Laws. *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1966). Under that approach, a court applies the law of the State with the most significant relationship to the occurrence and the parties, considering interests of the place of alleged injury (here, Arizona), place of alleged misconduct (here, Italy), the domicile of defendant (Italy) and the place where the relationship centers (here, of doubtful application). *Quare* the application of Arizona product liability and implied warranty law *circa* 1995 to a manufacturer who produced, sold and delivered in Italy in 1974, particularly where no one has shown the product was retailed in Arizona.

The Courts of Appeal and highest courts of the States have sharply split on major issues at the heart of *Uberti*. In each case, *Uberti* worsens the fragmentation by stretching beyond the farthest reach of the minority position.

A. *Uberti* Widens Existing Divisions of Authority Regarding Whether Minimal Contacts Must Be Based upon Contacts with the Forum State Or May be Based upon Contacts with the Entire United States.

The majority of courts have ruled that establishment of personal jurisdiction over a nonresident requires proof that he purposefully availed himself of the protections of the forum State's laws, and not those of the United States in general. *See Soo Line Railroad Co. v. Hawker Siddelely Canada, Inc.*, 950 F.2d 526, 530 (8th Cir. 1991) ("Hawker Siddeley did not design its railcars for use in Minnesota *per se*; it designed its railcars for use in North America. The relationship between Hawker Siddeley's design of railcars and the State of Minnesota is too remote to qualify as 'purposeful availment.'"); *Falkirk Mining Co. v. Japan Steel Works*, 906 F.2d 369, 375 (8th Cir. 1990) (Manufacture of a cam to specifications of a Delaware corporation does not support jurisdiction in North Dakota); *Gould v. P.T. Krakatau Steel,* 957 F.2d 573, 576 (8th Cir. 1992) ("Although it is arguable that Krakatau could have foreseen that its products would enter the United States, it is highly unlikely that Krakatau could have reasonably anticipated being haled into an

Arkansas court."); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-47 (4th Cir. 1994) (Sales of cigarette filter material by Massachusetts firm to a Kentucky firm is, despite volume, not conduct "in any way directed *toward the state of Maryland.*"); *Wiles v. Morita Iron Works Co.*, 125 Ill.2d 144, 161, 530 N.E.2d 1382, 1390 (1988) ("[W]hile it would be reasonable to assume that Morita had availed itself of the United States market, there is no showing that Morita purposefully directed its products into Illinois."); *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9 (1st Cir. 1986) (No jurisdiction over major American corporation, headquartered in California, which lacked contacts with forum Puerto Rico); *Vioski v. Calaveras Asbestos Co.*, 929 F.2d 352 (7th Cir. 1991) (Knowledge of shipment to California will not support jurisdiction in Illinois).

In contrast, two circuits have allowed a foreign manufacturer to be haled into State court based upon availment of the American market in general; in each case the evidence at least established significant direct use of the American market. *See Vermeulen v. Renault USA, Inc.*, 985 F.2d 1535, 1549 (11th Cir. 1993) (Manufacturer directly advertised product in U.S. and franchised over three hundred dealers); *Tobin v. Astra Pharmaceutical Products*, 993 F.2d 528 (6th Cir. 1993) (Manufacturer obtained FDA approval and licensed an American company to distribute items throughout entire of U.S.).

Uberti worsens this division. It not only places

Arizona's reading of the Fourteenth Amendment at odds with that of the First, Fourth, Seventh and Eighth Circuits and the Supreme Court of Illinois, but extends "purposeful availment" beyond the widest reach of the minority view. The mere fact that a commodity delivered in Italy was made for an American wholesaler, and has an appearance allegedly appealing to Americans, is sufficient to hale the manufacturer into court anywhere in the United States.

B. *Uberti* Is in Conflict with Rulings of the Courts of Appeal Holding that the Acts and Plans of an Independent Third Party Cannot Be Imputed to a Defendant.

In accord with *World-Wide Volkswagen*, *Burger King* and *Asahi*, the Seventh, Eighth, and Eleventh Circuits have accepted that the acts and marketing plans of a third-party distributor cannot be imputed to a manufacturer who stands at arm's length with the distributor. *See Viokski v. Calaveras Asbestos, Ltd.*, 929 F.2d 352, 353 (7th Cir. 1991); *Falkirk Mining Co. v. Japan Steel Works*, 906 F.2d 369, 375 (8th Cir. 1990); *Madara v. Hall* , 916 F.2d 1510, 1516 (11th Cir. 1990). The defendant, not those who buy from him, must avail himself of the privilege of doing business in the forum; it is he, not they, who must have fair notice of exposure to suit there.

Uberti places Arizona in direct conflict with this caselaw. If anyone sold the firearm in question to an Arizonan, or took advantage of an Arizona

market, it could not have been Uberti; ownership of the firearm had passed to Iver Johnson before it left Milan. Iver Johnson was no subsidiary, nor even a true distributor, of Uberti: it marketed the firearm under its own name as the "Iver Johnson Cattleman." *If* the firearm was sold to an Arizona dealer or citizen--a fact Plaintiffs did not demonstrate, and *Uberti* does not require them to demonstrate--it was sold by someone other than Uberti, pursuant to plans which were not shared with Uberti.[9]

By basing personal jurisdiction on the alleged marketing activities of a third party, the *Uberti* opinion places Arizona's understanding of the Due Process Clause at odds with that applied in the Seventh, Eighth, and Eleventh Circuits.

C. *Uberti* Worsens Existing Divisions of Authority Regarding What Intent Is Necessary to Constitute Purposeful Availment of a Forum's Markets.

The division of this Court in *Asahi* reflects a division as to whether the assertion of personal jurisdiction over a foreign manufacturer requires proof that the manufacturer *actively* sought to move its products into the forum, or whether proof of

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9 It is also noteworthy that the Arizona Supreme Court largely based its ruling upon the firearm's design, yet acknowledged that the firearm "was manufactured to the design and specifications prepared by and contracted for by Iver Johnson, a Massachusetts corporation...." Appendix C at 15.

actual but passive knowledge of such movement suffices. Faced with two options, the lower courts have divided into three camps--a division worsened by *Uberti*, which places Arizona in a fourth.

In accord with the *Asahi* plurality, the First, Fourth and Eleventh Circuits hold that actual but passive knowledge is an insufficient base for jurisdiction; the manufacturer must take some affirmative effort to direct the goods into the forum. *See Boit v. Gar-Tec*, 967 F.2d 671, 683 (1st Cir. 1992) ("[M]ere awareness that a product may end up in the forum state does not constitute purposeful availment"); *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 15 (1st Cir. 1986); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994) (Jurisdiction based on bare knowledge of sale would "destroy[] the notion of individual sovereignties inherent in our system of federalism"); *Madara v. Hall* , 916 F.2d 1510, 1519 (11th Cir. 1990).

In contrast, but in accord with the *Asahi* concurrence, the Fifth and Seventh Circuits and the Supreme Court of Illinois have found that actual knowledge of marketing suffices to establish jurisdiction or, conversely, that lack of actual knowledge precludes such establishment. *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) ("Austin sold fireworks to Bartolotta with the knowledge that its fireworks would reach Illinois consumers in the stream of commerce."); *Vioski v. Calaveras Asbest-*

os Ltd., 929 F.2d 352 (7th Cir. 1991) (No jurisdiction in absence of knowledge). In *Wiles v. Morita Iron Works, Ltd.*, 125 Ill.2d 144, 160, 530 N.E.2d 1382, 1389 (1988), the Illinois Supreme Court noted that under *either* the *Asahi* plurality or its concurrence, actual knowledge was a minimum requirement:

> Under either interpretation of the stream of commerce theory, it is clear that purposeful availment of the forum's market requires, at a *minimum*, that the alien defendant is '*aware* that the final product is being marketed in the forum State.' (Emphasis added.) (See *Asahi*, 480 U.S. at 117 .... (Brennan, J., concurring).

The Eighth Circuit has taken a third position, or perhaps staked the outer limits of the second, by equating "should have known" with "aware" in an exceptional case. *See Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 613 (8th Cir. 1994). In *Barone* there was strong reason for the manufacturer to expect that the distributor was selling to the forum state. The distributor was one of several, chosen with an apparent eye to each controlling a separate region, the forum State was nearby and within its apparent region, and the distributor's very name contained the words "Interstate Display Fireworks Co.." 25 F.3d at 613.

Uberti adopts a fourth approach, far beyond even the *Barone* holding, one which may aptly be labelled not "should have known" but "might have

discovered." Accepting that "nothing in this record indicates that Defendant knew the extent of Iver Johnson's sales efforts," Appendix C at 20, the court nonetheless asserts jurisdiction lest a foreign manufacturer "avoid jurisdiction of American courts by the simple expedient of closing its eyes and making no effort to learn about or restrict its distributor's activities." *Id.* at 21. Unlike *Barone*, there is no reason why Uberti would have expected the Massachusetts buyer to be selling in Arizona. Indeed, the *Uberti* cannot even be equated with any concept of "known," since there is no showing that Iver Johnson *did* sell its firearms in Arizona. *Uberti* premises jurisdiction upon the speculation that, if Uberti *had* inquired whether Iver Johnson was distributing to Arizona residents, it *might* have found the answer was yes.

By asserting jurisdiction based on what Defendant might have known, but did not know, *Uberti* is at odds with understandings of the Fourteenth Amendment which prevail in the First, Fourth, Fifth, Seventh, and Eleventh Circuits, and in the Supreme Court of Illinois.

D. By Asserting Jurisdiction Over an Item's Manufacturer Where it Cannot be Shown That the Item Entered the Forum through Commercial Channels, *Uberti* Worsens Existing Divisions of Authority.

As we have discussed above, establishment of special jurisdiction requires evidence that the item

out of whose use the action arises entered the forum jurisdiction through ordinary commercial channels. The requirement is delineated in *World-Wide Volkswagen*, underscored by the *Asahi* plurality, and accepted by the *Asahi* concurrence.

Prior to *Uberti*, the lower courts had largely adhered to this view, *see Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526, 530 (8th Cir. 1991); *Charlie Fowler Evangelistic Ass'n v. Cessna Aircraft Co.*, 911 F.2d 1564, 1566 (11th Cir. 1990), *Wiles v. Morita Iron Works, Ltd.*, 125 Ill.2d 144, 160, 530 N.E.2d 1382, 1390 (1988). The Seventh Circuit differed, albeit in a case involving movement of a consumer between two States in a well documented distribution area. In *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 668 (7th Cir. 1986), the court upheld jurisdiction where the item was sold elsewhere in the distributor's region, over a dissent based on *World-Wide Volkswagen*. 800 F.2d at 670-72 (Barker, J., dissenting).

Uberti goes far beyond *Giotis*, then turns this expansion into the rule and *World-Wide Volkswagen* into the exception. It upholds jurisdiction where all that is known of distribution is that the good was sold to a Massachusetts corporation and, seventeen years later, allegedly caused harm in Arizona. Appendix B at 5. Presence equals jurisdiction, with *World-Wide Volkswagen* seen as as a narrow exception to this rule, applicable only in the rare case where the defendant knew of the forum and actively restricted sales to its residents:

"But the *World-Wide Volkswagen* Court did *not* hold that Volkswagen, the manufacturer, could not be sued in Oklahoma. This case concerns jurisdiction over a manufacturer that *did not limit sales to any specific state.*" Appendix C at 14 (Emphasis in original). An unbridgeable chasm lies between the position of the Eighth and Eleventh Circuits and that of Arizona under *Uberti*.

Uberti and the cases cited above clearly indicate that more than one constitutional analysis is being employed to determine whether nonresident manufacturers whose products find their way into a particular State are subject to that State's jurisdiction. Depending upon where suit is brought, due process may forbid assertion of jurisdiction over a foreign manufacturer unless it directs goods to the forum State--or it may permit assertion if the manufacturer directs goods anywhere in the United States. Depending upon location, a manufacturer may be forced to defend only in a forum where the good arrived through normal distribution chain--or the manufacturer may be forced to defend in any forum within its distribution network regardless of how this good arrived there--or it may be forced to defend in any forum in the nation. Depending upon locale, a manufacturer may not be subject to jurisdiction if only actual but passive knowledge of the destination is shown--or it may be subject to suit if actual knowledge can be shown--or perhaps if it merely had reason to know--or perhaps if it had only the bare ability to have

found out. In a very real sense, different Due Process Clauses exist in different circuits, in Illinois and in Arizona. We respectfully submit that *Uberti* presents this Court with an opportunity to resolve these conflicts.

IV. The Question is Important and Ought To Be Settled.

It is unnecessary to elaborate the seriousness with which this Court has always regarded the exercise of jurisdiction by a State over those who have no say in its laws. The considerations at issue here--the tensions created and temptations posed--lie at the conceptual core of a federation of territorial sovereigns linked by a common commercial system. The international ramifications of these tensions is well illustrated by the ruling at issue: a foreign manufacturer is subjected to American jurisdiction for having made goods, in its own country, to an American firm's specifications.

The issues raised are exceptional in their incidence. Rarely do constitutional issues arise with such frequency as to generate near-chaos among the appellate courts, chaos illustrated by assertions that this Court's most recent ruling is not binding precedent but a "splintered view" providing "no clear guidance" to the circuits, *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 386,

and by a split *within* one Circuit.[10]

With the growth of international commerce, stimulated by recent international agreements, it becomes increasingly important to enable manufacturers to know whether and when they are subject to personal jurisdiction here. This they cannot know if the Due Process Clause has radically different meanings in different courts.

CONCLUSION

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the Supreme Court of Arizona.

David T. Hardy
Benenson & Kates

Attorney for Petitioner

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[10] The Eighth Circuit seems to apply the *Asahi* plurality to single sales and the *Asahi* concurrence to multiple ones. *Compare Falkirk Mining Co. v. Japan Steel Works*, 906 F.2d 369 (8th Cir. 1990) *with Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 614 (8th Cir. 1994).

APPENDIX A
ARIZONA SUPERIOR COURT, PIMA COUNTY

THOMAS CORDOVA, *et ux* Case No. 288547

vs. Date: Nov. 15, 1993

A. UBERTI & C.

HON. JOHN M. LEONARDO

UNDER ADVISEMENT RULING:

Having considered defendant A. Uberti & C.'s Motion to Dismiss based on lack of personal jurisdiction and improper service of process, the statements of counsel at hearing thereon, as well as Plaintiffs' Motion for Order granting alternative methods of service of process,

THE COURT FINDS that the Court ruled that service of process was accomplished in its minute entry of August 30, 1993, therefore the Court treats defendant's Motion for Dismissal on this same basis as a motion for reconsideration. The motion to reconsider is granted as is plaintiff's Motion for Order granting alternative methods of service and for an extension of time in which to serve under Rule 4(i). Upon reconsideration, the Court directs that plaintiff, pursuant to Rule 4.2(g)(1), service defendant A. Uberti & C. by faxing to defendant at defendant's Italian place of business and by registered mail sent to defendant's Italian place of business. Service by these alternative means having been completed as of October 26, 1993, as appears from the affidavits of Mr. Rockafellow, the Court finds that service of process has occurred

and directs defendant A. Uberti & C. to file its answer within the time limits specified by the Rules of Civil Procedure treating the date of November 15, 1993, as the date of service.

These alternative methods of service are provided as an alternative to internationally agreed means reasonably calculated to give notice which were not effected within six months from the date on which the assistance of the foreign government was requested by plaintiff. An extension of time in which to accomplish service by the alternative means under Rule 4(i) is granted as the Court finds that plaintiff has made good faith efforts to serve in a timely manner.

THE COURT FURTHER FINDS that plaintiff has established sufficient purposeful contact with Arizona by defendant A. UBERTI and C. to establish personal jurisdiction over that defendant in Arizona under *Asahi Metal Industry v. Superior Court,* 480 U.S. 102 (1986). Those actions which go beyond the mere stream of commerce theory of foreseeability are:

1) Defendant's catalogue printed in English and distributed by distributors in the United States.

2) Defendant's guns are designed for appeal to the western United States consumers.

3) Defendant has at least eight U.S. distributors.

4) Defendant has imported into the U.S. over 10,000 firearms between January 1, 1988 and July 30, 1992.

5) Defendant's firearms are sold through

Tucson gun stores, at least three of which regularly stock them.

6) Printed instructions that accompany defendant's firearms when purchased in Arizona are in English and include defendant's Italian address and phone number.

7) A listing of defendant's line of gun production including pictures is printed in English.

8) The writing on the packaging for defendant's firearms sold in Arizona are printed in English and include the Italian address and phone number of defendant.

Based on the foregoing,

IT IS ORDERED defendant's Motion to Dismiss (Motion for Summary Judgment) based on lack of personal jurisdiction is denied.

IT IS FURTHER ORDERED plaintiff's Motion for Sanctions is denied.

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

A. UBERTI AND C., an Italian corporation,

Petitioner,

v.

THE HONORABLE JOHN S. LEONARDO, JUDGE FOR THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA,

Respondent,

THOMAS CORDOVA AND DELIA CORDOVA, surviving parents of CORRINA CORDOVA, deceased,

Real Parties in Interest.

2 CA-SA 93-0154

SPECIAL ACTION PROCEEDINGS
RELIEF GRANTED

F E R N A N D E Z, Judge

Petitioner A. Uberti and C. (Uberti) seeks relief from the respondent judge's order denying its motion to dismiss a products liability action filed

against it by real parties in interest Thomas and Delia Cordova (Cordovas) for want of personal jurisdiction. Because petitioner has no equally plain, speedy or adequate remedy by way of appeal, Ariz. R. P. Spec. Actions 1, 17B A.R.S., we accept jurisdiction. For the reasons set forth below, we conclude that the trial court abused its discretion in misapplying the law applicable to the facts of this case. Ariz. R. P. Spec. Actions 3(c); *see State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983). We therefore grant relief.

The facts underlying the Cordovas' lawsuit are largely undisputed. Their daughter was killed when a gun manufactured by Uberti fell to the ground and discharged. The Cordovas allege that the gun is defective and unreasonably dangerous and on this basis sought damages from Uberti.

Uberti is a corporation organized under the laws of Italy. The gun in question is a replica of an 1873 Colt single action revolver and was manufactured in Italy at the request of Iver Johnson Arms, an American company, in accordance with the latter's specifications. It was sold F.O.B. in Milan in 1974 and was subsequently distributed in the United States under the name "Iver Johnson Cattleman." In accordance with federal law, however, the gun also bore the name of the manufacturer, Uberti. Uberti has no officers, agents or property anywhere in the United States. Its guns are currently sold in the United States by eight independent distributors and can be purchased in gun stores in Arizona. Uberti moved to dismiss the action, arguing that the Arizona court's assertion of jurisdiction over it would violate the Due Process Clause of the United States Constitution as interpreted in the decisions of the United States Supreme Court. In denying the

motion, the trial court ruled:

> THE COURT . . . FINDS that plaintiff has established sufficient purposeful contact with Arizona by defendant A. UBERTI and C. to establish personal jurisdiction over that defendant in Arizona under *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986). Those actions which go beyond the mere stream of commerce theory of foreseeability are:
>
> 1) Defendant's catalogue printed in English and distributed by distributors in the United States.
>
> 2) Defendant's guns are designed for appeal to the western United States consumers.
>
> 3) Defendant has at least eight U.S. distributors.
>
> 4) Defendant has imported into the U.S. over 10,000 firearms between January 1, 1988 and July 30, 1992.
>
> 5) Defendant's firearms are sold through Tucson gun stores, at least three of which regularly stock them.
>
> 6) Printed instructions that accompany defendant's firearms when purchased in Arizona are in English and include defendant's Italian address and phone number.
>
> 7) A listing of defendant's line of gun production including pictures is printed in English.
>
> 8) The writing on the packaging for defendant's firearms sold in Arizona are printed in English and include the Italian address and phone number of defendant.

A state may, consistent with due process, assert personal jurisdiction over a nonresident defendant only if that defendant has, by his or her own action, purposefully established sufficient "minimum contacts" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985). The contacts must be the result of the defendant's conduct, not that of a third party, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L.Ed. 2d 490 (1980), and the connection with the forum must be "such that he should reasonably anticipate being haled into court there," Id. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501, and have "fair warning that a particular activity may subject a may subject a person to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 2587, 53 L. Ed. 2d 683, 706 (1977) (Stevens, J., concurring).

Although there are three possible grounds on which to base personal jurisdiction, *see Hoskinson v. State of California*, 168 Ariz. 250, 812 P.2d 1068 (1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 582 (1991), the parties agreed at oral argument that the only one applicable to this case is specific jurisdiction. Specific jurisdiction may be found when the subject lawsuit is based on or arises out of a defendant's contacts with the forum state. *Armstrong v. Aramco Services Co.*, 155 Ariz. 345, 746 P.2d 917 (App. 1987). But to comport with the requirements of due process, it must be shown that "the defendant has `purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that `arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182, 85 L. Ed. 2d at 541 (citations omitted). Thus, events occurring after the

conduct out of which the lawsuit and the jurisdictional claim arise are irrelevant to an assertion of specific jurisdiction. The record is clear that all but the second of the trial court's findings related to events that occurred after the manufacture and sale of the gun in question; therefore, they cannot support the assertion of personal jurisdiction.

The remaining finding pertains to the design of the gun to appeal to consumers in the western United States. Apart from the fact that there is no evidence in the record to support this finding, much less its specific connection with Arizona, the finding does not support the assertion of jurisdiction. Indeed, from the facts set forth above, there is no basis for concluding that in 1974 Uberti purposefully directed its activities toward the United States, much less toward Arizona, such that it could expect to defend a lawsuit here. The manufacture and sale of the gun were initiated by Iver Johnson and took place in Italy. Uberti had no agreement with Iver Johnson to market or distribute its products in the United States, let alone Arizona. The record does not even indicate how the gun came to be in Arizona almost twenty years after its original purchase in Italy and shipment to New York. On these facts, Arizona can not constitutionally assert personal jurisdiction over Uberti.

The Cordovas also content that if the existing case law does not support the assertion of jurisdiction, given the realities of modern commerce, it ought to. While some members of the Arizona Supreme Court may agree with this position, *see Hoskinson v. State of California*, 168 Ariz. 177, 812 P.2d 995, *cert. denied*, ___ U.S. ___, 112 S. Ct. 582 (1991) (order denying petition for review), we are

bound by the precedent of the United States Supreme Court and our own supreme court. Because the trial court's decision is contrary to those decisions, we grant relief.

The respondent judge's order denying the motion to dismiss is vacated, and the cause is remanded with directions to grant the motion to dismiss.

LLOYD FERNANDEZ, Judge

CONCURRING:

MICHAEL A. LACAGNINA, Judge

PHILIP G. ESPINOSA, Judge

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ARIZONA

A. UBERTI and C., an Italian corporation,

Petitioner,

Supreme Court
No. CV-94-0062-PR

vs.

HON. JOHN S. LEONARDO, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima,

Court of Appeals
2 CA-CV 93-0154

Respondent,

THOMAS CORDOVA and DELIA CORDOVA, surviving parents of CORRINA CORDOVA, deceased,

Real Parties in Interest.

Special Action from the Superior Court
in Pima County
The Honorable John S. Leonard, Judge
AFFIRMED AND REMANDED

Opinion of the Court of Appeals, Division Two
177 Ariz. 451, 868 P.2d 1034 (Ct. App. 1994)
VACATED

FELDMAN, Chief Justice

Two-year-old Corrina Cordova died in a 1991 handgun accident in Tucson. Thomas and Delia Cordova, her parents ("Plaintiffs"), sued A. Uberti and C. ("Defendant"), an Italian firearms manufacturer, claiming it manufactured and distributed a defective and unreasonably dangerous revolver that caused the accident. Defendant moved to dismiss the complaint for lack of in personam jurisdiction. The trial judge denied the motion, but the court of appeals accepted special action[1] jurisdiction and granted relief, ordering the trial judge to dismiss the complaint.

We granted Plaintiffs' petition for review to examine whether Arizona can assert jurisdiction over Defendant. See Ariz. R. Civ. App. P. 23(c)(4). We have subject matter jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. § 12-120.24.

FACTS AND PROCEDURAL HISTORY

A. The revolver

We view the facts in the light most favorable to Plaintiffs, the non-moving party. *Estate of Hernandez v. Arizona Bd. of Regents*, 177 Ariz. 244, 247, 866 P.2d 1330, 1333 (1994). As a result, in reviewing summary judgment for Defendant we must accept Plaintiffs' contention that the gun was defective and unreasonably dangerous.

Before the fatal accident on November 29, 1991, Henry Pacho, a Tucson resident, acquired a .357 magnum revolver manufactured in Italy by Defend-

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[1] In Arizona, relief formerly obtained by writs of prohibition, mandamus, or certiorari is now obtained by "special action." Ariz. R. P. Spec. Act. 1.

ant and sold through its American firearms distributor, Iver Johnson Arms. Henry cleaned the weapon, fired it a few times, wrapped it in a towel, and then stored it, fully loaded, under the seat of his car. He forgot about the revolver until the day of the accident when his wife, Ruby, took the car to a self-serve car wash with her sister and two children. One of the children was Corrina, Ruby's niece. Before washing the car, Ruby vacuumed the interior. As she pulled the towel from the car, the gun fell to the pavement and discharged. The bullet struck Corrina in the head and killed her.

Defendant produced the gun as a replica of the 1873 Colt "Peacemaker" and called it the "Cattleman." To preserve its authentic look and design, the gun was made without modern safety devices that would have prevented the accidental discharge that killed Corrina. Defendant's catalog described the gun as follows:

> SINGLE ACTION 1873 CATTLEMAN
>
> Slip it out of its holster, twirl it round your finger, raise and aim it all in one movement. It is balanced and sighted with the natural shooter in mind, and has no match the world over. Today as yesterday, it is the '73, the "Peacemaker," the "Frontier". Identical in shape and dimensions to its predecessor, this replica is safe, precise, trusty and indestructible, a legend since 1873.

Appendix to Plaintiff's Petition for Review at 58 (side 2).

Colt Industries manufactured the first Peacemaker six-shot, single-action revolver in 1873. It was adopted for United States government service that same year and became known as "the gun that

won the West." In 1892, Colt and other gun manufacturers began making safer, more reliable, and more efficient revolvers with a double-action feature[2] and a swing-out, rather than fixed, cylinder. The federal government replaced the Peacemaker with newer models partly because the Peacemaker did not meet government safety standards. Despite a diminishing market, Colt continued making the 1873 model until 1941 and resumed production in 1956. *See Bender v. Colt Indus., Inc.*, 517 S.W.2d 705, 706-07 (Mo. App. 1974).

In the 1950s, television westerns created a new market for replica firearms. Erik Larson, *Sturm Ruger Defends a Revolver in Hundreds of Lawsuits*, WALL ST. J., June 24, 1993, at A1. Sturm, Ruger & Co. ("Sturm Ruger"), an American firearms manufacturer, brought back the single-action revolver, replicating the 1873 Peacemaker and calling it the "Old Model." Sturm Ruger sold over 1.5 million of these replicas after beginning production in 1953. Due to many injuries from accidental discharges and resulting lawsuits, [3] Sturm Ruger stopped producing the Old

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[2] With a single-action revolver, the hammer must be pulled back and cocked before the gun can be fired. The newer, double-action revolver can be fired without first cocking the hammer.

[3] *See, e.g., Sturm. Ruger & Co. v. Dav*, 615 P.2d 621 (Alaska 1980); *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19 (Ky. 1979). *See generally* Larson, *supra*. at A1. Larson notes that by 1981, the Old Model accounted for 190 reported injuries from accidental discharges. *Id*. In 1981, Sturm Ruger reported that 60 suits associated with the Old Model were filed against it. Id. Although it settled most of the cases. 12 of the 17

Model in 1973 and brought out a new single-action revolver that incorporated a safety mechanism to prevent accidental discharges. Since 1973, however, long after lawsuits drove Sturm Ruger from this hazardous market, Defendant continues to manufacture faithful replicas of the 1873 six-shooter without the safety devices found on other guns.

Safe carriage and storage of the Cattleman require that the hammer be down (uncocked) and resting on an empty chamber to prevent discharge if the guns hammer is hit. Resting the hammer on a loaded chamber is extremely unsafe. *See, e.g., Johnson v. Colt Indus. Inc.*, 797 F.2d 1530, 1532 (10th Cir. 1986) (referring to "drop-fire" hazard). As originally designed, the Peacemaker's hammer rested very close to the firing pin when uncocked. If the hammer on a loaded chamber and is struck even by a moderate force, the gun can fire. Later models have various drop-fire safety devices, such as a transfer bar, that prevent the hammer from striking the firing pin when the safety is engaged. Without the safety features of modern firearms, when carrying six live rounds the Cattleman is as inherently dangerous as the original Peacemaker. According to the affidavits of record, the absence of improvements used in other firearms to guard against the risk of accidental firing made the Cattleman both defective and unreasonably dangerous. *See also Bender*, 517 S.W.2d at 706; *Sturm Ruger & Co. v. Bloyd*, 586 S.W.2d 19, 20 (Ky. 1979).

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cases that reached a court decision were decided in Sturm Ruger's favor, some on appeal. *Id*. However, in 1982, settlements cost Sturm Ruger almost one-quarter of its net income. *Id* .

The gun in this case was fully loaded when Henry put it under the car seat. Defendant attempted to correct the danger posed by a loaded single-action revolver by designing a safety notch on the hammer that would engage the trigger when the hammer is pulled back to its quarter position. However, Plaintiffs' firearm expert stated in his affidavit that either this gun did not have a safety notch or it failed when the gun fell from the car. [4] Thus, with or without the safety feature engaged, the loaded revolver may have been equally susceptible to accidental discharge when dropped.

B. Legal proceedings

After their daughter's death, Plaintiffs brought this action against Defendant in Pima County, alleging Defendant was liable for the design, manufacture, sale, and distribution of a defective and unreasonably dangerous product. [5] Defendant moved to dismiss or, in the alternative, for summary judgment based on lack of personal juris-

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[4] When the hammer is pulled to its first click -- "quartercocked"--a safety notch on the hammer engages the trigger. In this position, the gun cannot be fired until the hammer is brought to its full-cocked position. According to Plaintiffs firearm expert, however, this safety mechanism is mechanically too weak to reliably perform its function and historically has proven ineffective. See also Bender, 517 S.W.2d at 706. The expert examined the revolver and found that this safety feature either was dysfunctional when Pacho placed it under the car seat or broke when the gun fell.

[5] Arizona follows the doctrine of strict liability. Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 246-48, 709 P.2d 876, 880-82 (1985) (strict liability analysis applies "defective and unreasonably dangerous" test to product quality and design).

diction. Several documents and affidavits supported the motion.Plaintiffs responded by offering supporting documents and affidavits of their own. The judge and counsel treated the matter as a motion for summary judgment, with both parties citing to the documents and affidavits that accompanied all filed pleadings.

Some of the evidentiary materials contained in the documents and affidavits relating to the motion may be subject to objection on foundational, hearsay, or other evidentiary grounds. Neither counsel nor the trial judge raised any evidentiary dispute in the summary judgment proceedings, and so far as the record before us shows, the judge relied on the affidavits and documents in making his findings. Accordingly, at least at this stage of the proceedings, we deem any evidentiary objection waived. *Ancell v. Union Station Assoc.*, 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990) (evidentiary and foundational objections to sufficiency of supporting documents attached to summary judgment pleadings are necessary to allow offering party an opportunity to cure defects); see also *Barone v. Rich Bros. Inter- state Display Fireworks*, 25 F.3d 610, 611 n.2 (8th Cir.), *cert. denied*, 115 S. Ct. 359 (1994) (objections to evidence must be raised at trial court to be considered on review).

The trial judge made eight findings of fact concerning personal jurisdiction over Defendant:

> THE COURT FURTHER FINDS that plaintiff has established sufficient purposeful contact with Arizona by defendant . . . to establish personal jurisdiction . . . under *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986). Those actions which go beyond the mere stream

of commerce theory of foreseeability are: (1) defendant's catalog printed in English and distributed by distributors in the United States. (2) *defendant's guns are designed for appeal to the Western United States consumers.* (3) defendant has at least eight U.S. distributors. (4) defendant has [exported] into the U.S. over 10,000 firearms between January 1, 1988 and July 30, 1992. (5) defendant's firearms are sold through Tucson gun stores, at least three of which regularly stock them. (6) printed instructions that accompany defendant's firearms when purchased in Arizona are in English and include defendant's Italian address and phone number. (7) a listing of defendant's line of gun production including pictures is printed in English. (8) the writing on the packaging for defendant's firearms sold in Arizona are printed in English and include the Italian address and phone number of defendant.

Based on the foregoing, it is ordered defendant's motion to dismiss (motion for summary judgment) based on lack of personal jurisdiction is denied.

Minute Entry Order of Nov. 15, 1993 (emphasis added).

The court of appeals reasoned that jurisdiction could not be asserted unless Defendant "purposefully directed" its activities at Arizona and the case resulted from injuries arising from or relating to those activities. *A. Uberti & C. v. Leonardo*, 177 Ariz. 451, 453, 868 P.2d 1034, 1036 (App. 1994) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182 (1985)). The court of appeals held that events "after the manufacture and sale of

the gun in question" were irrelevant and "cannot support the assertion of personal jurisdiction." Id. After disposing of seven of the trial court's eight findings as factually irrelevant, the court held that the remaining finding (No. 2) and the facts of the case as a whole provide "no basis for concluding that in 1974 Uberti purposely directed its activities toward the United States, much less toward Arizona, such that it could expect to defend a lawsuit here." *Id.*

We review de novo a dismissal for lack of in personam jurisdiction and "simply look to the non-moving party to make a prima facie showing of jurisdiction." *Barone*, 25 F.3d at 611; *Maloof v. Rapper Sales, Inc.*, 113 Ariz. 485, 487, 557 P.2d 522, 524 (1976). We conclude that a prima facie showing was made in this case.

DISCUSSION

A. Specific jurisdiction

Plaintiffs do not contend Arizona has general jurisdiction over Defendant. Indeed, Defendant has no agents, no physical presence, no offices, and no property within Arizona. *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987). Instead, the question is one of "specific jurisdiction." *Maloof*, 113 Ariz. at 487, 557 P.2d at 524 (specific jurisdiction applies when there is no general jurisdiction, the cause of action arose in the forum state, the defendant caused the event to occur, and the exercise of jurisdiction comports with the Fourteenth Amendment). Defendant claims that no personal jurisdiction exists under either the Arizona or United States Constitution. We easily resolve the issue with respect to our state constitution. Arizona will exert personal juris-

diction over a nonresident litigant to the maximum extent allowed by the federal constitution. Ariz. R. Civ. P. 4.2(a); *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367, 542 P.2d 24, 26 (1975) ("Arizona's long arm statute . . . is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States."). The jurisdictional issue thus hinges on federal law.

Under the federal constitution, two factors govern the scope of due process for in personam jurisdiction: (1) the defendant's "minimum contacts" with the forum state and (2) the reasonableness of exercising jurisdiction over the foreign defendant. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026 (1987). We first consider the nature and extent of Defendant's contacts with Arizona.

B. Minimum contacts

1. Legal test

Did Defendant have sufficient minimum contacts with Arizona to allow our courts to exercise jurisdiction in accord with fundamental principles of fairness as required by the Fifth and Fourteenth Amendments? *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Two views of the minimum contacts requirement split the Supreme Court in *Asahi*, its most recent personal jurisdiction case. Four justices[6] concluded that jurisdiction depends on

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[6] Justice O'Connor wrote the Court's opinion, with Chief Justice Rehnquist and Justices Powell and Scalia joining in all parts. Justices White, Marshall, and Blackmun joined Justice Brennan's concurring opinion in which he dissented from the minimum contacts part of the Court's opinion.

"whether the defendant purposefully established 'minimum contacts' in the forum state" by placing products into the stream of commerce and engaging in forum-related conduct. *Asahi*, 480 U.S. at 108-09, 107 S. Ct. at 1030 (quoting *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183). These contacts must be based on acts "by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 109, 107 S. Ct. at 1030. While disclaiming the idea that foreseeability was wholly irrelevant to personal jurisdiction, these four justices required something more than the mere foreseeability that the defendant's products could injure a resident of the forum state before the exercise of jurisdiction would comport with due process. *Id.* at 110, 107 S. Ct. at 1031. Conduct showing the defendant's intent to serve the forum state's market must involve some substantial connection between the defendant and the forum state. *Id.* at 112, 107 S. Ct. at 1032. The defendant must do more than merely put the product into the stream of commerce, knowing that it may find its way to the forum state. *Id.*

Four other justices took a broader stance, concluding that the minimum contacts aspect of due process was satisfied if the defendant was aware of its product's entry into the forum state through the ordinary distribution channels of the stream of commerce. *Id.* at 117, 107 S. Ct. at 1034-35

Justice Stevens wrote separately to say that he found it unnecessary for the Court to reach the question because California's exercise of jurisdiction was unreasonable whether or not the defendant had purposeful contacts with California. *Asahi*, 480 U.S. at 121-22, 107 S. Ct. at 1037.

(Brennan, J., concurring in part) ("the stream of commerce refers . . . to the regular and anticipated flow of products from manufacturer to distribution to retail sale and provides sufficient contacts for exercising jurisdiction so long as the "participant in this process is aware that the final product is being marketed in the forum state" and so long as the product does not get to the forum state as part of the "unpredictable currents or eddies" of commerce). Thus, due process does not demand additional conduct by the defendant.

We do not enter the debate between these two views, nor do we speculate on its ultimate resolution. Instead, we decide this case under *Asahi*'s more restrictive interpretation of due process:

> The "substantial connection," between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum State.

Id. at 112, 107 S. Ct. at 1032 (O'Connor, J.) (emphasis added). We therefore examine those facts for indicia of intent to serve the forum state's market.

2. Defendant's position

Defendant's argument parallels the court of appeals' reasoning: Defendant's contacts with Arizona between the date of manufacture and the date of the accident, even though those contacts involve the same product, are irrelevant. Defendant contends that the only contacts with Arizona that

should concern us are those in 1974, when Defendant manufactured and first sold the gun, placing it in the stream of commerce. Although Defendant could have foreseen that its product, exported to the United States through an independent American distributor, might find its way to Arizona and there cause harm, Defendant contends that mere foreseeability that the stream of commerce may bring the product to Arizona or any other state -- like a leaf in the trade winds -- is insufficient. On that point, Defendant may be correct. *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183 (foreseeability in causing injury is distinguished from foreseeability in causing injury in a specific state; a state may not exercise personal jurisdiction solely because a product fortuitously arrived and caused injury) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980)).

We believe, however, that the record shows a great deal more than the mere foreseeability that in today's world any product -- like this Italian weapon -- may end up anywhere. Defendant's reliance on *World-Wide Volkswagen* is factually misplaced. In that case, the plaintiff purchased an automobile from a New York dealer, drove it to Oklahoma, and was severely injured when it exploded into flames after another car hit it. The plaintiff sued the New York dealership and national distributor in Oklahoma. The Court held that Oklahoma had no jurisdiction over the dealership and distributor, which operated and intended to operate only on an intra-state basis even though they must have foreseen that some of the vehicles they sold would be driven to other states, such as Oklahoma. Such foreseeability is not the kind that renders a state's exercise of personal jurisdiction

valid under the due process clause. *Asahi*, 480 U.S. at 109, 107 S. Ct. at 1031 (citing *World-Wide Volkswagen*, 444 U.S. at 297-98, 100 S. Ct. at 567). But the *World-Wide Volkswagen* Court did not hold that Volkswagen, the manufacturer, could not be sued in Oklahoma. The question in the present case does not involve jurisdiction over a dealership doing business only in a particular state. This case concerns jurisdiction over a manufacturer that *did not limit sales to any specific state*.

We turn then to examine the facts relating to in personam jurisdiction as they existed at the time the gun entered the stream of commerce. We do not measure minimum contacts by Defendant's present activities in Arizona. *See Barone*, 25 F.3d at 611 (focusing its jurisdictional analysis on the defendant's contacts with the forum state in the years just prior to the accident). We consider Defendant's recent business activities only insofar as they shed light on its contacts in 1974.

3. Made for America

It is undisputed that Defendant knowingly and intentionally manufactured its products for the United States. The record establishes that Defendant knew its products, passing through its American distributor, Iver Johnson, would flow into local markets across America.

Of some importance, we believe, is Defendant's own description of its business. Defendant's catalog states:

> A note from the production facilities of Aldo Uberti and Company Gardone V.T., Italy. Founded in 1959 especially to produce replica percussion revolvers, the firm of Aldo Uberti has

become the largest and best known producer of historical arms of all types in the world.

From the first our firearms have exactly duplicated the lines and proportions of the original Colts, Winchester, Henrys, Derringers . . . . Recognized throughout the world as the finest firearms of their type, all are accepted . . . as perfect duplicates of the originals in all aspects.

* * *

All of our firearms are proof tested at the Italian National Proof House and are so stamped.

Appendix to Plaintiff's Petition for Review at 51 (emphasis added). This description suggests that Defendant's products are not manufactured for exclusive sale in the Italian market. Other facts reinforce the conclusion that Defendant made these guns for the American market. According to Bureau of Alcohol, Tobacco and Firearms records, Defendant made the revolver that killed Corrina and sold it to Iver Johnson Arms in November 1974. The gun was manufactured to the design and specifications prepared by and contracted for by Iver Johnson, a Massachusetts corporation that wanted to market a replica of the 1873 Colt single-action revolver in the United States under Iver Johnson's name, and therefore was made for distribution only by Iver Johnson. Pietro Uberti, Defendant's delegated administrator, acknowledged that Defendant marked the finished firearm with Iver Johnson's name. Both "Iver Johnson's Fitchburg Mass. - U.S.A." and "A. Uberti & C. Gardone V.T. Italy" were stamped on the gun in question. Once the firearms arrived in America, Iver Johnson was to package them along with instructions, warnings, and other materials and

market them as the Iver Johnson Cattleman.

Defendant delivered the firearms in Italy, F.O.B. Milan, to Iver Johnson through an intermediary, L.A. Distributors, which may have been under the same management as Iver Johnson. In any event, Defendant manufactured the guns for Iver Johnson, a distributor known to Defendant as an American company serving the American market. Through this distribution channel, Defendant exported its products from Italy to the United States by direction rather than chance. *See Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1137 (N.J. 1986) ("the system through which the manufacturer distributes its products evidences the manufacturer's purposeful penetration of the market").

The manufacturing and export-import arrangement between Defendant and Iver Johnson was not an isolated transaction but the start of a substantial business relationship. Between 1973 and 1978, Uberti manufactured for export and sale to Iver Johnson over 22,000 single action Cattleman revolvers. In 1974, the year Defendant produced the gun in question, Defendant made and exported 2,138 of the guns to the United States for distribution by Iver Johnson. Thus, the gun in question reached America deliberately, not fortuitously, as part of a stream of Defendant's products designed and directed for export to America.

Defendant emphasizes that it did not exercise any control over Iver Johnson's distribution once the guns left Italy. Accepting this assertion does not, we believe, change the essential fact that distinguishes this case from *Asahi*. In that case, a

Japanese component manufacturer made valve assemblies for tubes and tires and sold them to several manufacturers, including a Taiwanese firm that incorporated the valve assembly into its finished tubes, which it then sold throughout the world, including the United States. 480 U.S. at 106, 107 S. Ct. at 1029. The component manufacturer had little control over the final destination of its products once they were delivered into the stream of commerce because they were ferried to distant, worldwide markets in other manufacturers' finished goods. In contrast, Defendant not only placed a finished product into a trade stream of its own choosing but chose a distributor intending to penetrate the American market.

The record supports the trial judge's finding that Defendants gun was designed and manufactured for the American market. Defendant made the gun to the specifications of an American importer. This replica was obviously never meant for sale or distribution to any nation's military force or for use by hunters seeking game or citizens seeking self-protection. It is and was "[f]rom the first," as Defendant's catalog indicates and the trial judge concluded, of interest only to gun enthusiasts and collectors enthralled with the Old West and its weapons. Tires are used everywhere, but guns like this are peculiarly American. Thus, although we do not doubt there are nonAmerican gun collectors interested in these firearms, the trial judge legitimately inferred in finding No. 2 that this was a product made for America.

Also important, we believe, are facts showing the distribution of Defendant's guns after 1974. Although we evaluate the minimum contacts between Defendant and Arizona up to the date of

the gun's manufacture and sale to Iver Johnson, Defendants catalogs and advertising and subsequent developments support the conclusion that the gun, as a replica of an American frontier weapon, was originally and primarily designed and made for the American market. We therefore disagree with the court of appeals and conclude that the record does support the trial judge's finding that "[D]efendant's guns are designed for appeal to the western United States consumers."

This conclusion is significant. As Justice O'Connor said in *Asahi*:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, *designing the product for the market in the forum State*, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or *marketing the product through a distributor who has agreed to serve as a sales agent in the forum State.*

480 U.S. at 112, 107 S. Ct. at 1032 (emphasis added, citations omitted).

The facts in this case amply support -- indeed compel -- the trial judge's conclusion that the gun was designed for the western states and knowingly marketed through a distributor to intentionally serve the United States.

4. Intent to serve Arizona

Defendant argues, however, that the record will not support the conclusion that Defendant specifically intended its guns to be marketed in Arizona. Indeed, for all this record shows, Defendant never heard of Arizona. This raises the

following question: Having shown that the gun was knowingly designed for and exported to exploit the market of the United States or western United States, must Plaintiffs additionally show that Defendant had the specific intent to market the gun in Arizona, or is it enough to show that Defendant intended to market it in any state, group of states, or all states? We conclude that only the latter is necessary.

Defendant argues that its activities, at best, focused on the United States in general, not Arizona. Therefore, Arizona exceeds due process by asserting its jurisdiction here. Were this true, then no individual state could assert jurisdiction over Defendant simply because Defendant did not target a particular state or group of states but instead intended to sell its product to all of America. The argument turns common sense on its head. Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona, Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America. Given evidence of intent to serve this market, according to Justice O'Connor's opinion in *Asahi* principles of due process permit suit against Defendant in states where its products cause damage.

> Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or

> indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.

480 U.S. at 110, 107 S. Ct. at 1031) [7](quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567, and *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239 (1958)) (quotes omitted)).

This is not a *World-Wide Volkswagen* case involving a dealership limited to serving a state's market but a much broader case involving an international manufacturer through its chosen distributor serving and intending to distribute to the national American market. Thus, we do not believe that Plaintiffs must show Defendant's specific intent to sell in Arizona. An intent to sell across America is enough.

It is also true that nothing in this record indicates that Defendant knew the extent of Iver Johnson's sales efforts. Nor is there any indication that Defendant attempted to make itself aware of or restrict those efforts. We do not believe that a foreign manufacturer that knowingly and intentionally distributes its products in America through an American company can avoid jurisdiction of American courts by the simple

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[7] We bear in mind that *Asahi* did not hold that California had no jurisdiction over the Taiwanese valve stem manufacturer in an action brought by the injured consumer. The Court held only that the valve stem manufacturer was not amenable to California jurisdiction in an indemnity action brought by the Japanese tire manufacturer.

expedient of closing its eyes and making no effort to learn about or restrict its distributor's activities.[8] To confer immunity in that situation makes no legal sense. *See Giotis v. Apollo of the Ozarks. Inc.*, 800 F.2d 660, 667 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092, 107 S. Ct. 1303 (1987).

Moreover, Defendant's argument defies economic logic. Due process does not give foreign companies a safe harbor to manufacture goods designed for and shipped to America and at the same time immunize them from the penalties of noncompliance with American safety standards. Such a rule would drive American manufacturers out of business while allowing foreign businesses to produce, with absolute immunity, unreasonably dangerous and defective products for the American market. We see no violation of traditional notions of fair play and substantial justice in holding manufacturers of goods destined for America legally responsible if those goods are defective and unreasonably dangerous and cause harm in America.

Solid precedent supports this conclusion. In *Barone*, the Third Circuit held that a fireworks manufacturer/seller heading a network of several regional distributors and "thus realizing the much

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[8] Defendant could have avoided the risk of products liability in Arizona by making some affirmative effort to preclude distribution of its products in our state. *See Bush v. BASF Wyandotte Corp.*, 306 S.E.2d 562, 568 (N.C. App. 1983) (lawful assertion of personal jurisdiction when manufacturer "purposefully injected [its] product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina").

greater economic benefit of multiple sales in distant forums . . . may satisfy the purposeful availment test" of the more restrictive view in *Asahi*. 25 F.3d at 613 (quoting *Giotis*, 800 F.2d at 667) . *See also Vermeulen v. Renault. U.S.A. Inc.*, 985 F.2d 1534, 1548-50 (11th Cir. 1993) (after applying Justice O'Connor's view of minimum contacts, finding jurisdiction over foreign carmaker who sold its products to a U.S. distributor who took title in France but engaged in additional forum related conduct such as designing cars for America). For jurisdictional purposes, we see no difference between a manufacturer distributing products nationally through several regional distributors and a manufacturer distributing through a single national distributor. *See Tobin v. Astra Pharmaceutical Prod.. Inc.*, 993 F.2d 528, 543 (6th Cir.) (a "deliberate decision to market" products in all 50 states through a national distributor satisfies the more restrictive view of purposeful availment test in *Asahi*), *cert. denied sub nom. Duphar v. Tobin*, 114 S. Ct. 304 (1993).

Further, as *Barone* indicates, even if the manufacturer has no actual knowledge, its distributor's actions "may suggest an effort to reach much of the country." 25 F.3d at 613. The same is true here. Iver Johnson's advertisements in national gun magazines and descriptions in Defendant's catalog cater to an unrestricted nationwide market that includes Arizona. *See Morris v. SSE. Inc.*, 843 F.2d 489, 494 (11th Cir. 1988) (advertising in national trade magazine sufficient to establish that defendant advertised in forum state). It is fair to say after Asahi, as it was before, a foreign manufacturer's use of an independent American distributor "will not

insulate a non-resident foreign corporation from suit." *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1190 (6th Cir.) (foreign manufacturer's gun brought to forum state possibly through the same distributor, L.A. Distributors, that shipped Uberti's gun to Iver Johnson), *cert. denied sub nom. Insurance Co. of N. Am. v. Poyner*, 449 U.S. 841, 101 S. Ct. 121 (1980).

Allowing a defendant that has purposefully exploited the United States market to "insulate itself from the reach of the forum State's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products" would undermine principles of fundamental fairness and due process. *DeJames v. Magnificence Carriers Inc.*, 654 F.2d 280, 285 (3rd Cir. 1981); *see also Vermeulen*, 985 F.2d at 1548 (delivering title in foreign country "in no way determines the degree of contacts between the United States and [the defendant]"); *Burger King*, 471 U.S. at 474, 107 S. Ct. at 2183 (due process is not a territorial shield to avoid interstate obligations that have been voluntarily assumed).

The evidence, in fact, shows that Defendant's guns have been available for sale to Arizona residents since at least 1974, the year the gun in question was first sold. Although Defendant's name is not mentioned, GUN DIGEST, a national publication for the firearms trade and gun enthusiasts, listed the Cattleman in Iver Johnson advertisements in 1974 and 1975. Defendant's Appendix to Opposition for Petition for Review at

165. [9] *See Poyner*, 618 F.2d at 1191 (German gun manufacturer found to have purposefully availed itself of Kentucky consumers through U.S. distributor's national and regional advertisements). Thus, we hold that the minimum contacts requirement for exercising personal jurisdiction is met.

C. Fair and reasonable exercise of jurisdiction

In addition to Defendant's minimum contacts with Arizona, we must consider whether it is reasonable to subject Defendant to Arizona jurisdiction. *Asahi*, 480 U.S. at 115, 107 S. Ct. at 1033. This requires us to weigh several factors: Defendant's burden of transoceanic litigation, Arizona's interest in resolving this products liability action, Plaintiff's interest in obtaining relief in Arizona, and another nation's procedural and substantive interests in Arizona's exercise of jurisdiction. *Id.* at 113-15, 107 S. Ct.at 1033-34.

In *Asahi*, the entire Court agreed that it was unreasonable to subject the defendant to California's jurisdiction. The Taiwanese plaintiff in Asahi sought indemnification from the Japanese valve-stem manufacturer for the judgment the court rendered in favor of the California resident who was injured when the product failed. The Supreme Court found the Japanese defendant's

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[9] Defendant's Petition for Special Action in the Court of Appeals at 3, contained in its Appendix, asserts as fact that "American trade publications in 1974 simply identified the firearm as an 'Iver Johnson Cattleman' which was 'Imported by Iver Johnson,' making no mention of Uberti." As noted, however, the gun was stamped with both Iver Johnson's and Defendant's names.

burden in submitting to litigation in a distant and unfamiliar judicial system far greater than California's slight interest in the outcome of an indemnification claim between two foreign corporations. *Id.* at 114-15, 107 S. Ct. at 1033. Moreover, the Court was circumspect about "extending our notions of personal jurisdiction into the international field." *Id.* at 115, 107 S. Ct. at 1034 (citation omitted). Even if the defendant might have had sufficient contacts with the forum state, a unanimous Court found California's exercise of personal jurisdiction unfair and unreasonable. *Id.*

This case is different; *Asahi*'s facts are inapposite. Arizona has a strong interest in protecting the health, safety, and welfare of its residents. Exercising jurisdiction over a manufacturer of defective and unreasonably dangerous consumer products provides a forum for Arizona residents harmed by such products and a deterrent to selling unreasonably dangerous products in the state. Moreover, the accident occurred in Arizona, Plaintiffs and important witnesses reside in Arizona, and much material evidence is located here. Given the significance of Arizona's interest in providing a forum and Plaintiffs' similar interest, Defendant must demonstrate a very significant burden to avoid litigation here.

Defending this action in Arizona will not create a hardship on Defendant sufficient to outweigh the state's interest in providing a local forum for its citizens and protecting them from defective products. In 1958, the United States Supreme Court noted that as technology has drawn the world markets closer, "progress in communications and transportation has made defense of a suit in a foreign tribunal less burdensome." *Hanson*, 357

U.S. at 251, 78 S. Ct. at 1238. Telephones, facsimile machines, and photocopiers answer the logistical problems as easily for lawsuits pending in Arizona as those anywhere in a world reached by telecommunications satellites. As Defendant has already demonstrated, competent Arizona counsel is available to represent it. Defendant's burden may be greater defending in Tucson than in Milan, but it is certainly manageable.

Finally, we see no procedural or substantive conflict with Italian law that might arise from resolving this matter in an Arizona court. Indeed, economic treaties such as NAFTA and GATT, designed to secure the future of global commerce and advance internationally-shared social and economic policies, make it reasonable for a plaintiff's home state to exercise jurisdiction over a foreign manufacturer of allegedly defective goods reasonable. *Barone*, 25 F.3d at 615. Nor would holding an Italian manufacturer accountable under Arizona law be an undue burden on Italian-United States relations. Arizona's exercise of jurisdiction over Defendant is reasonable. We therefore find that, on this record, Plaintiffs made a prima facie showing that the trial court had personal jurisdiction over Defendant.

CONCLUSION

Defendant had sufficient minimum contacts so that due process permits Arizona to exercise personal jurisdiction and require Defendant to answer for the harm its product caused here. Exercising jurisdiction here is fair and reasonable. The trial judge's order denying dismissal is affirmed. If future discovery indicates lack of jurisdiction, the trial court is free, of course, to

make the appropriate order. We therefore vacate the court of appeals' opinion and remand this matter to the trial court for further proceedings consistent with this opinion.

STANLEY G. FELDMAN,
Chief Justice

CONCURRING:

JAMES MOELLER, Vice Chief Justice

ROBERT J. CORCORAN, Justice

THOMAS A. ZLACKET, Justice

FREDERICK J. MARTONE, Justice

The Right Honorable the Lord Woolf, Lord of Appeal in Ordinary, sat with the court at oral argument but did not participate in the determination of this matter.

Appendix D

IN THE COURT OF APPEALS OF THE STATE OF ARIZONA
DIVISION TWO

[Caption omitted] AFFIDAVIT OF
EDWARD J. OWEN

EDWARD J. OWEN, being first duly sworn, upon his oath deposes and says:

.....

2. At Leighton H. Rockafellow's request, I made several phone calls to several gun shops in Tucson, Arizona, on the morning of December 8, 1993, between the hours of 10:00 and 10:30 a.m. The purpose of the calls was to determine gun shops that had Uberti firearms in stock, gun shops that would order Uberti firearms, and gun shops that would not order or did not carry Uberti firearms. The gun shops I called and the results obtained are listed below alphabetically:

A. George's Gun Shop

.....

Reports one Uberti firearm in stock as of December 8, 1993, and further reported that they would special order any Uberti firearm.

B. Sahuaro Firearms

.....

Reports no Uberti firearms currently in stock, but would special order.

C. Murphy's Gun and Gunsmithing

.....

Reports two Uberti firearms in stock and would order.

D. Powder Keg Gun Shop

.....

Reports one used and one new Uberti in stock and would order from their regular distributor.

E. Cash Box Pawn Company

.....

Reports no Uberti firearms in stock and would not order.

F. Jensen's

.....

Reports three Uberti firearms in stock, with more coming in within the next thirty days, and would order.

G. John's Gun Shop & Supply

.....

Reported no Uberti firearms in stock [does not stock handguns].

H. West of the Pecos Guns

.....

Reports two new Uberti firearms in stock and one used Uberti firearm in stock and would order.

.....

/s/

Edward J. Owen

(2)

No. 95-42

Supreme Court, U.S.
FILED
JUL 31 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

A. UBERTI & C.,

Petitioner,

v.

SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF PIMA; HON. JOHN M. LEONARDO, JUDGE (THOMAS AND DELIA CORDOVA, REAL PARTIES IN INTEREST),

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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1995

QUESTION PRESENTED

Did the Arizona Supreme Court correctly find that Petitioner A. Uberti & C. had sufficient minimum contacts with the State of Arizona so that due process permitted Arizona to exercise personal jurisdiction that required the Defendant to answer for the harm its product caused in Arizona?

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CASES:

Asahi Metal Industry v. Superior Court, 480 U.S. 102 (1986) 3, 4, 5

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 3

STATUTES AND RULES:

Rule 4.2(a) Arizona Rules of Civil Procedure 2

STATEMENT OF THE CASE

I. Proceedings Below.

Petitioner's statement of the proceedings below accurately sets forth the history of the case.

II. Facts Established.

Petitioner has taken great liberty in expanding actual facts established by the Court of Appeals and Supreme Court of the State of Arizona.

Of importance is Petitioner's acknowledgement that the firearm in question was manufactured by the Petitioner to Iver Johnson's specifications. The record below as provided to the Court by Petitioner demonstrates that in a nationally distributed gun digest magazine, the Iver Johnson Cattleman (the gun in question) was listed. (See Appendix A, page 1; See Petitioner's Appendix C-24, footnote 9)

While the Defendant takes the position that Iver Johnson had no contractual arrangement with Uberti regarding any subsequent retailing or distribution activities, the record is clear that Uberti was actively involved in the marketing of its firearms in the United States of America during the 1974-1975 time frame. In fact, Uberti would send its own workmen to the United States to perform warranty repairs on the firearms, and Aldo Uberti himself visited Fitchburg, Massachusetts numerous times. (See Appendix B, Imperato Deposition, See Appendix C, Thibodeau Deposition)

Overlooked is the fact that the Court was given ample evidence that the weapon in question contains

serious manufacturing defects. (See Appendix D, Martin Affidavit)

Petitioner is correct that the long-arm jurisdiction of Arizona courts found in Rule 4.2(a) of the Arizona Rules of Civil Procedure asserts jurisdiction to the maximum extent permitted by the Constitution of the State of Arizona and the Constitution of the United States of America. This was adequately discussed by the Arizona Supreme Court with a finding that asserting jurisdiction against Petitioner A. Uberti & C. did not violate state or federal due process limitations.

REASONS FOR DENYING THE WRIT

III. There is nothing unique about the Arizona Supreme Court decision that would justify this Court in accepting Petitioner's Petition for Writ of Certiorari. The Arizona Supreme Court decision is well-reasoned, and complies fully with prior United States Supreme Court decisions on the jurisdictional question and complies fully with Arizona law regarding the assertion of jurisdiction over non-resident defendants. It was a unanimous decision. The Arizona Supreme Court even left the door open for the Petitioner to continue its efforts to escape responsibility on jurisdictional grounds in the last sentence of its Opinion wherein Justice Feldman wrote "If future discovery indicates lack of jurisdiction, the trial court is free, of course, to make the appropriate order. . . . " (Petitioner's Appendix C, pages 26 and 27.)

The Arizona Supreme Court Opinion is a carefully reasoned one. In fact, Justice Feldman observed that

when deciding the application of *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986), the most restrictive interpretation of due process would be utilized. (Petitioner's Appendix C-12.) Justice Feldman correctly observed that the Petitioner's reliance on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), was incorrect and factually misplaced. Justice Feldman correctly observed that the United States Supreme Court did not hold that Volkswagen, the manufacturer could not be sued in Oklahoma. In fact, the case proceeded not only against Volkswagen, the manufacturer, but against the importer as well. It was only a local distributor and a local dealership that was found not to have sufficient minimum contacts with the state of Oklahoma to confer jurisdiction.

Nor did the Arizona Supreme Court measure minimum contacts by the Defendant's present activities in Arizona. As Justice Feldman observed: "This case concerns jurisdiction over a manufacturer that *did not limit sales to any specific state.*" (Petitioner's Appendix C-13, 14) (emphasis supplied)

Justice Feldman relied upon Uberti's own written material in finding that Uberti was not only present in America, but had a world-wide presence. Justice Feldman noted that the Defendant's catalog stated that Uberti was the "best known producer of historical arms of all types in the world." (Petitioner's Appendix C-14, 15) Justice Feldman reasoned that the established contact between Iver Johnson and Uberti proved that Uberti manufactured the guns for Iver Johnson to Iver Johnson's specifications and that Iver Johnson was known to Uberti to be an American company serving the American market. It was

through this distribution channel that the Defendant Uberti exported its products from Italy to the United States by direction rather than chance. (Petitioner's Appendix C-14, 15 and 16)

This Court should keep in mind that the product in question is a finished product, not a component part. As Justice Feldman observed, the Defendant Uberti not only placed a finished product into a trade stream of its own choosing, but chose a distributor intending to penetrate the American market. (Petitioner's Appendix C-17)

Quoting from Justice O'Connor's comments in *Asahi, supra,* Justice Feldman found that designing the product for market in the forum state or marketing the product through a distributor who has agreed to serve as a sales agent in the forum state, was significant. He concluded that the facts of the case compelled the trial judge's conclusion that the product in question was designed for the western United States and knowingly marketed through a distributor to intentionally serve the United States of America. (Petitioner's Appendix C-18)

The Arizona Supreme Court correctly concluded that Iver Johnson's advertisements in national gun magazines and descriptions in the Defendant Uberti's catalog catered to an unrestricted nation-wide market that includes the state of Arizona. (Petitioner's Appendix C-22)

CONCLUSION

Petitioner's attempt to persuade this Court that there is a great conflict among circuits as to how to determine *Asahi* is of no moment. Justice Feldman in his decision pointed out that he was using the most restrictive standard used in *Asahi*. Resolving any perceived conflict among different circuits as to how to interpret *Asahi* cannot be accomplished in this case. The complained of "confusion" and different interpretations of that decision are not part of this case.

The decision of the Arizona Supreme Court is well-reasoned, is not in conflict with prior decisions of this Court, and does not raise any significant federal question. Petitioner's Petition for a Writ of Certiorari from this Court should be denied.

Respectfully submitted,

ROCKAFELLOW LAW FIRM

LEIGHTON H. ROCKAFELLOW
Attorney for Real Parties in Interest Cordova

APPENDIX A

DA GUNS DIGEST 1975

HANDGUNS – SINGLE ACTION REVOLVERS

IVER JOHNSON CATTLEMAN MAGNUM
Caliber: 257, 44 Mag., 45 LC, 6-shot.
Barrel: 4 3/4" 5 1/2", or 7 1/4", 44 Mag. avail. with 6", 6 1/4" or 7 1/4"
Weight: 2 1/2 lbs.
Stocks: Smooth walnut.
Sights: Fixed.
Features: Case-hardened frame, single action, blued barrel, brass backstrap and trigger guard, imported by Iver Johnson.
Price: 357, 45 LC. . . . $151.75 44 Mag. . . . $175.95

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ROGER BAUGHMAN, Plaintiff, - against - IVER JOHNSON ARMS COMPANY, INC. and A. UBERTI AND C. CARDONE, INC., Defendants.	CU-80-05179

January 13, 1983
2:40 o'clock P.M.

DEPOSITION of Defendant, IVER JOHNSON ARMS COMPANY, INC., by LOUIS M. IMPERATO, taken by Plaintiff, pursuant to Notice dated December 22, 1982, held at the offices of Adler Reporting Service, 15 Park Row, New York,New York 10038, on January 13, 1983, at 2:40 P.M., before John D'Alessandro, CSR, a Notary Public of the State of New York.

. . .

P. 40

Q. Is it true that you were assured by Mr. Uberti when you started the distribution of these guns that they were a safe gun?

A. Yes.

Q. And that they could not be fired other than by pulling the trigger?

A. Yes.

Q. They couldn't be fired if they were dropped?

A. Right.

Q. You wouldn't have distributed the gun if you would have known if they would be fired when dropped; would you?

A. Exactly

. . .

P. 48

Q. Question on page 96 of this deposition says: "Did you in the course of inspections find guns which had to be rejected for various reason?

"Answer: Yes.

"Question: And returned to Uberti?

"Answer: Yes. I think what Uberti did was let his men do the repairs."

A. They came in, we saved them for them.

. . .

P. 50 and 51

Q. I am handing you Exhibit 3. Would you read that letter, please?

Mr. Hall: I will read it.

The Witness: Thank you.

Mr. Hall: Exhibit 3 is a letter of Ben Nero, Vice President, addressed to Aldo Uberti & Company, September 24, 1975.

"Dear Mr. Uberti: We have completed a study of Cattleman warranty repairs for the period September 1, 1974 to August 31, 1975. You shipped us 9118 Cattleman Revolvers, of which 1123 were returned for warranty repair, or a shocking 13%.

"Your quality is much worse than it was a year ago, and this after two price increases presumably justified by stricter quality measures instituted by you. We have lost many customers for the Cattleman because of the higher prices and poorer quality! With the company being poor, you have compounded our difficulties.

"We are billing you for 1123 repairs of $15.00 each, less the 1% agreed on and will deduct this bill from our next payment.

"1123 @ $15.00 ea.	$16,845.00
less 1% of $526,270.25 –	5,262.70
due Iver Johnson's	11,582.30

"The repairs listed are only the ones we have done here at Iver Johnson's; many of our distributors are repairing Cattleman themselves as a courtesy to their customers. We supply the parts at no charge and they do

the repairs. If all of these repairs were figured in, the figure we have presented would be drastically higher. Thirteen percent is bad enough, but with the outside repairs, the figures would be disgraceful!

Very truly yours, Iver Johnson's Arms, Inc., Ben Nero, Vice President.

"P.S. We have requested parts several times and have not received any – we won't be able to repair Cattleman very shortly!"

. . .

P. 52

Q. How long was it after the last letter in September of 1975 before you quit selling these guns?

A. I am not sure when that did occur, but I do know that Mr. Uberti did send some men over to repair the guns.

. . .

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN B. BROWNING and BETTY BROWNING Husband and Wife,	)	No. F-80-23 Civil
Plaintiffs,	)	
vs.	)	
IVER-JOHNSON ARMS, INC.; BERENSON HARDWARE; and PAY 'N SAVE CORP.,	)	
Defendants,	)	
and	)	
IVER-JOHNSON ARMS, INC.,	)	
Third Party Plaintiff,	)	
vs.	)	
ALDO UBERTI,	)	
Third Party Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION OF
ALFRED THIBODEAU
1:20 P.M.
February 25, 1982
1610 Pacific Building
Seattle, Washington

HELEN M. POPELKA, Court Reporter

. . .

P. 164

Q. Now, when these guns came from Uberti, as I understand it, each one of them was packed in a separate box by Uberti?

A. Yes.

Q. And the boxes had the Iver Johnson name on them, did they?

A. Yes.

Q. Have you, yourself, ever met Aldo Uberti?

A. Yes, I have.

Q. Once or more than once?

A. More than once. He made many trips to Fitchburg, came over with his wife several times.

. . .

January 1982

Jurisdiction of Litigation	Counsel for Iver Johnson
Stanton v. I.J. & A. Uberti & Co. S/N 33336 .44 Magnum District of Montana, Missoula Div. Case No. CV-79-62-M	Dzivi, Conklin, & Nybo 104 Fourth St. North P.O. Box 1291 Great Falls, Montana 59403 406-727-7121 (Dick Dzivi)
Brumett v. I.J. S/N 26974 .44 Magnum State of Calif. County of Los Angeles Case No. C-292647	Amil Roth 1888 Century Park East Suite 120 Century City Los Angeles, Calif. 90067 213-277-7747

Baugham v. I.J. & A. Uberti & Co. S/N 22104 .44 Magnum State of New Mexico County of Bernalillo Case No. CV-80-05179	Rodey, Dickason, Sloan, Akin & Robb, P.A. 20 First Plaza, Suite 700 Albuquerque, New Mexico 87103 505-765-5900 (Ken Ferguson)
Browning v. I.J. Berenson Hardware, Pay 'N Save Corp. S/N 31633 .357 Magnum Case No. F-80-23 Civil District of Alaska	Merdes, Schaible, Staley & Delisio, Inc. 300 Barnette St. P.O. Box 810 Fairbanks, Alaska 99707 907-452-1855 (Dennis Cook)
Thomas v. I.J. S/N 42227 .44 Magnum Case No. ?	Ed Lamberty P.O. Box 1078 Dallas, Texas 75221 214-742-1156
Livesay Etc. v. I.J. & Uberti & Co. S/N 27032 .357 Magnum United States District Court Eastern District of Kentucky At Frankfort Action No. 81-28	Bennett, Bowman, Triplett & Vittitow 231 South Fifth St. Louisville, Kentucky 40202 502-583-5581 (Lee Sitlinger)

"Cattleman Revolvers"

Iver Johnson's has sold 22,536 single action Revolvers manufactured by Uberti from 1973 to 1978. Exhibit B1

Year	.357 Mag.	.44 Mag.	.22 Cal.	45 Long Colt
1973	356	1313	260	75
1974	2138	2980	490	1192
1975	2162	4453	304	1008
1976	492	2021	47	595
1977	763	1235	49	430
1978	173	-0-	-0-	-0-

APPENDIX D

STATE OF MARYLAND
COUNTY OF HARFORD

AFFIDAVIT OF LAMA S. MARTIN

Before me, the undersigned authority, personally appeared Lama S. Martin, who being duly sworn, deposes and says:

1. My name is Lama S. Martin.

2. I have appeared as an expert witness in matters involving firearms in courts of the State of Arizona and every other state except Hawaii, North Dakota and South Dakota. I have tested and analyzed firearms for over 32 years.

. . .

My examination of this revolver reveals that when the hammer is uncocked resting in the down position the firing pin protrudes through the breech face .062 inch. This is two times that required and makes this revolver much more dangerous when the hammer is uncocked and the gun is loaded. This excess protrusion is either a design defect or a manufacturing defect.

. . .

/s/
Lama S. Martin

Sworn to and subscribed before me this 27th day of July 1993.

/s/
Leslie A. Martin
Notary Public, State of Maryland
My Commission expires:
October 1, 1993